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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

DEC 16 1994

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of )  
)  
Telephone Company-Cable Television ) CC Docket No. 87-266  
Cross-Ownership Rules, )  
Sections 63.54-63.58 )  
)  
Amendments Of Parts 32, 36, ) RM-8221  
61, 64, And 69 Of The )  
Commission's Rules To Establish )  
And Implement Regulatory Procedures )  
For Video Dialtone (VDT) Service )

**COMMENTS OF NYNEX**

New England Telephone and  
Telegraph Company and  
New York Telephone Company

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(i)

## **SUMMARY**

NYNEX commends the Commission for issuing the Third Further Notice as another important step to attain the Commission's video dialtone objectives. In these Comments, NYNEX provides information responsive to the Commission which indicates that the economics and feasibility of digital technology are expected to continue to improve. In the near term, however, it will probably not be feasible to meet all demand for capacity due to the technical and economic limits on the expandability of analog capacity and the costs associated with using digital capacity.

The Commission and the industry confront the challenge of how to obtain maximum public benefits from a scarce resource -- analog capacity -- consistent with the common carrier nature of the basic VDT platform. The Commission should adopt its tentative conclusion that channel sharing mechanisms can offer an effective and efficient way to meet this challenge. Absent channel sharing, many smaller video information providers (VIPs) may not be able to afford or have the means to deliver their programming. Channel sharing can assure a diverse, non-duplicative array of local programming that will include a strong foundation product to make possible viable competitive alternatives to cable service. The Commission should continue to be guided by its goal of regulatory flexibility in addressing channel sharing proposals. We show that the Commission has already addressed a number of rules and policies that provide a workable regulatory framework to be applied to analog channel sharing to meet the Commission's objectives.

(ii)

The Commission does not have the legal authority to impose preferential access obligations on video dialtone providers similar to obligations imposed on cable operators. Nor do the underlying factual circumstances make it appropriate for the Commission to impose preferential access obligations. In addition, the process for recovering the cost of preferential access must also be examined.

NYNEX does recognize the validity of public policy goals of providing customer access to certain programming. It is clear, however, that imposition of preferential access arrangements must be tailored to the economic and market considerations of video dialtone services. NYNEX proposes, therefore, to participate with the FCC to examine preferential access arrangements. That examination will determine the appropriateness of preferential access arrangements for video dialtone services including whether this is a Level 1 or Level 2 obligation and the full range of options for preferential rate treatment.

NYNEX contends that the existing regulatory structure for pole attachments provides ample opportunity for facilities-based competitors to resolve the availability of pole attachment rights. Telephone companies should not, therefore, be required to include in the Section 214 Application process a statement of availability of pole attachment rights or conduit space.

Telephone companies should be permitted, but not required to acquire cable facilities in markets in which “two wire-based multi-channel video delivery systems would likely not be viable” when existing cable facilities can be acquired and upgraded by the telephone company to provide telephony and video services for less cost than new construction.

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**COMMENTS OF NYNEX**

The NYNEX Telephone Companies<sup>1</sup> ("NYNEX") file these Comments in response to the Commission's Third Further Notice of Proposed Rulemaking released November 7, 1994 ("Third Further Notice") in the above-captioned matter.

**I. INTRODUCTION AND OVERVIEW**

In the Third Further Notice the Commission seeks comment on:

(1) mechanisms for addressing the apparent short-term constraints on the expandability of analog channel capacity; (2) modifications to the prohibition on LEC acquisition of cable facilities and a corresponding modification to the non-ownership affiliation rules; (3) proposals that the Commission

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<sup>1</sup> The NYNEX Telephone Companies are New England Telephone and Telegraph Company and New York Telephone Company.

require or permit LECs to provide preferential video dialtone access or rates to certain classes of video programmers; and (4) possible changes to the Commission's rules governing pole attachments and conduit rights.<sup>2</sup>

NYNEX commends the Commission for issuing the Third Further Notice as another important step towards achieving the Commission's video dialtone goals of:

facilitating competition in the provision of video services; promoting efficient investment in the national telecommunications infrastructure; and fostering the availability to the American public of new and diverse sources of video programming.<sup>3</sup>

In these Comments, NYNEX provides information responsive to the Commission which indicates that the economics and feasibility of digital technology are expected to continue to improve. In the near term, however, it will probably not be feasible to meet all demand for capacity due to the technical and economic limits on the expandability of analog capacity and the costs associated with using digital capacity.

The Commission and the industry confront the challenge of how to obtain maximum public benefits from a scarce resource -- analog capacity -- consistent with the common carrier nature of the basic VDT platform. The Commission should adopt its tentative conclusion that channel sharing mechanisms can offer an effective and efficient way to meet this challenge.

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<sup>2</sup> CC Docket No. 87-266, Memorandum Opinion and Order on Reconsideration released November 7, 1994 ("VDT Recon. Order"), para. 14. (The VDT Recon. Order and Third Further Notice are contained in the same FCC document.)

<sup>3</sup> VDT Recon. Order at para. 3.

Absent channel sharing, many smaller video information providers (VIPs) may not be able to afford or have the means to deliver their programming. Channel sharing can assure a diverse, non-duplicative array of local programming that will include a strong foundation product to make possible viable competitive alternatives to cable service. The Commission should continue to be guided by its goal of regulatory flexibility in addressing channel sharing proposals. We show that the Commission has already addressed a number of rules and policies that provide a workable regulatory framework to be applied to analog channel sharing to meet the Commission's objectives.

The Commission does not have the legal authority to impose preferential access obligations on video dialtone providers similar to obligations imposed on cable operators. Nor do the underlying factual circumstances make it appropriate for the Commission to impose preferential access obligations. In addition, the process for recovering the cost of preferential access must also be examined.

NYNEX does recognize the validity of public policy goals of providing customer access to certain programming. It is clear, however, that imposition of preferential access arrangements must be tailored to the economic and market considerations of video dialtone services. NYNEX proposes, therefore, to participate with the FCC to examine preferential access arrangements. That examination will determine the appropriateness of preferential access arrangements for video dialtone services including whether this is a Level 1 or Level 2 obligation and the full range of options for preferential rate treatment.

NYNEX contends that the existing regulatory structure for pole attachments provides ample opportunity for facilities-based competitors to resolve the availability of pole attachment rights. Telephone companies should not, therefore, be required to include in the Section 214 Application process a statement of availability of pole attachment rights or conduit space.

Telephone companies should be permitted, but not required to acquire cable facilities in markets in which “two wire-based multi-channel video delivery systems would likely not be viable” when existing cable facilities can be acquired and upgraded by the telephone company to provide telephony and video services for less cost than new construction.

## **II. THE COMMISSION SHOULD PERMIT VDT PROVIDERS THE FLEXIBILITY TO ADOPT SHARING ARRANGEMENTS FOR ANALOG CHANNEL CAPACITY**

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### **A. The Economics And Feasibility Of Digital Technology Should Continue To Improve**

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The Commission envisions VDT as a common carrier platform containing sufficient capacity to serve multiple video programmers, which platform can “expand as demand increases so as to avoid becoming a bottleneck.”<sup>4</sup> In the past, the Commission has expressed concern about the technical and economic constraints on expanding VDT analog capacity.<sup>5</sup>

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<sup>4</sup> Third Further Notice at para. 268.

<sup>5</sup> See VDT Recon. Order at paras. 38-39; Third Further Notice at para. 268.



While the deployment of digital VDT transmission facilities can help address those constraints, the Commission has also expressed concern over the economic and technical viability of digital capacity in the short term. This latter concern reflects the Commission's uncertainty about the widespread availability, commercial feasibility and end user costs of digital compression and transmission equipment.<sup>6</sup> In this regard, the Commission solicits comments on such issues as whether digital compression and transmission equipment will be commercially available on a broad scale in the near future; the quality of compressed digital video; the costs of digital equipment; and the cost of set-top converters.<sup>7</sup>

Initially, it should be noted that each analog TV channel requires 6 MHz of spectrum. This is the established standard, and the embedded base of television sets accommodates the standard allocation of frequencies to channels. Given an overall radio frequency spectrum allocation, the number of analog channels that can be carried in that spectrum is determined.

However, significant technological advances have been achieved through the digitization and compression of analog signals. Techniques for obtaining more digital bits per hertz have produced 64 QAM and 16 VSB, which allow up to 28 and 38Mbps to be carried in each 6 MHz analog channel slot. Adequate picture quality can be achieved using MPEG 2 standards at 3Mbps, or even 1.5Mbps for some applications. This allows the same amount of radio frequency to carry either one analog television channel,

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<sup>6</sup> Id.

<sup>7</sup> Id. at para. 270.

or 12 to 25 digital channels, with no perceived loss of quality to the subscriber.

Technical advances in this area have been rapid. Numerous companies are developing commercial products for delivery of compressed digital video programming. Some of these products are now commercially available, and others will be commercially available within 12 months. The direct broadcast satellite system developed by RCA clearly demonstrates the technical, economic and operational feasibility of such systems for satellite distribution. The compressed digital video technologies being developed by such companies as Zenith, AT&T, Compression Labs, C-Cube, Scientific Atlanta, Philips, General Instruments, Divicom, etc. are similar to the RCA technology, and will be suitable for delivering digital video programming to subscribers over broadband networks.

As for the quality of compressed digital video, RCA's direct broadcast satellite systems currently use MPEG-1 compression. The video presented by this system appears to be of good quality. The next generation of encoders that utilize MPEG-2 as well as more advanced filtering techniques will offer even better video quality.

A major cost component for digital VDT systems is in the real-time digital encoder, which currently costs approximately \$80,000 per channel. This cost is expected to significantly decline as the VDT market expands and manufacturers realize economies in producing more units. These costs would

be spread among many VDT users and should not dramatically impact VDT demand.

Set-top devices represent another major cost factor for VDT. In this regard, basic digital decoders are projected to cost approximately \$350-\$450 over the next couple of years. This cost is generally expected to decline over the long term. To the extent VDT end users each require a set-top box, the cost of these devices can significantly affect VDT demand.

**B.    The FCC Should Permit Analog Channel Sharing Arrangements**

1.    The Underlying Challenge: The Commission seeks comment on how to address “the apparent technical and economic constraints on the provision and expansion of analog channel capacity.”<sup>8</sup> The Commission observes that “at least in the short term, it may not be feasible for LECs to meet all demand for capacity due to the technical limits on the expandability of analog capacity and the costs associated with using digital capacity.”<sup>9</sup> As the Commission recognizes, “it would not be reasonable to require LECs to expand to meet all demand, regardless of technical and economic considerations.”<sup>10</sup> Thus, the underlying challenge is how to obtain

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<sup>8</sup> VDT Recon. Order at para. 24.

<sup>9</sup> Id. at para. 39.

<sup>10</sup> Id. at para. 38.

maximum public benefits from a scarce resource -- analog capacity<sup>11</sup> -- consistent with the common carrier nature of the basic VDT platform.

2. Justification for Analog Channel Sharing: Consistent with the Commission's view of the common carrier nature of the basic VDT platform, the Commission has held that LECs offering VDT service "may not allocate all or substantially all analog capacity to a single 'anchor programmer'."<sup>12</sup> The Commission invites comment on channel sharing approaches under which programmer-customers (i.e., video information providers) would be able to share analog channel programming, thereby permitting a more effective use of capacity:<sup>13</sup>

Generally, channel sharing arrangements would make available to all programmer-customers subscribing to the basic platform the programming on shared individual channels or blocks of channels. In turn, the shared channels could be made part of the programmers' general service offering.<sup>14</sup>

The Commission recognizes that the intended benefits of analog channel sharing include:

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<sup>11</sup> To the extent the Commission mandates or authorizes video dialtone preferences (e.g., with respect to local over-the-air broadcast and public, educational or governmental [PEG] programming), the Commission must take account of the consumption of scarce analog capacity that will occur. See Third Further Notice at paras. 255, 280-81.

<sup>12</sup> VDT Recon. Order at para. 2. See also id. at para. 35.

<sup>13</sup> Id. at para. 24; Third Further Notice at paras. 268-75.

<sup>14</sup> Id. at para. 271.

maximiz[ing] use of analog capacity by avoiding carriage of the same video programming on more than one analog channel, thereby making video dialtone more attractive and available to multiple video programmers, and more marketable to consumers.<sup>15</sup>

To secure these benefits, the Commission tentatively concludes that:

channel sharing mechanisms, if properly structured, can offer significant benefits to consumers, programmer-customers, and video dialtone providers, while remaining consistent with the requirements of the cross-ownership provisions of the 1984 Cable Act.<sup>16</sup>

This tentative conclusion should be adopted.<sup>17</sup>

Analog channel sharing strikes a balance between the spectrum constraints of a transmission medium and the interests of individual VIPs to achieve the greatest benefit for both VIPs and end-user subscribers. While from a purely technical perspective, an all-digital system would maximize the capacity for transport of video programming, this conclusion must be tempered by market considerations. At the present time, the majority of

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<sup>15</sup> Id.

<sup>16</sup> Id. at para. 274.

<sup>17</sup> Of course, as the Commission has recognized, VDT is “technology neutral.” CC Docket No. 87-266, Video Dialtone Order, 7 FCC Rcd 5781, n. 104 (1992); see also VDT Recon. Order at para. 34. Indeed, carriers are permitted to offer all-digital systems. See id. at n. 38; New Jersey Bell Telephone Company, 9 FCC Rcd 3677 (1994) (FCC conditionally approved VDT Section 214 Application with respect to an all-digital VDT platform for Dover, New Jersey). Accordingly, NYNEX’s comments herein on analog channel sharing are premised upon a carrier electing to offer some analog capacity.

television viewing time is spent on network local over-the-air broadcast and satellite transmitted channels. In addition, the embedded base of television sets is only equipped to display analog signals, and a substantial portion of the sets are not cable ready. Therefore, the development of an all-digital transmission system would require the deployment of digital set-top converter boxes for every television and every VCR for every subscriber to the service. At the present state of technical development, this is an uneconomic prospect.

The division of the radio frequency between digital channels and shared analog channels can provide maximum value to end users and programmer-customers by extending the benefits of a basic building block of signals in the most efficient way possible. This means that it should be accomplished utilizing the least frequency spectrum possible, to allow maximum availability of spectrum for other services. Channel sharing attempts to achieve the goal of avoiding transmission of identical material over multiple analog channels. Multiple versions of the same local over-the-air broadcast programming on additional analog channels needlessly reduce the spectrum that could be made available to digital services, at a 12 to 1 rate, because of compression techniques. This does not maximize benefit to VIPs and end-user customers.

Absent channel sharing, many VIPs will not be able to afford or have the means to deliver their programming. For example, it would be quite

costly for small, boutique or interactive VIPs to incur investments for individual headend facilities. Channel sharing can assure a diverse, non-duplicative array of programming.

Further, analog channel sharing will help make VDT a success in its critical introduction stage. Channel sharing will afford VDT providers the flexibility needed to develop innovative new services that will enhance consumer choice and foster viable competition to cable companies. The availability of analog channel sharing will not only help ensure viable competition; it will stimulate the growth and success of independent video dialtone programmers by providing a strong foundation product with which to associate their offering.

Accordingly, analog channel sharing will advance the Commission's "overarching goals of creating opportunities to develop an advanced telecommunications infrastructure, increasing competition in the video marketplace, and enhancing the diversity of video services to the American public."<sup>18</sup>

### 3. Policies And Rules To Apply To Analog Channel Sharing:

The Commission indicates it does not intend to prescribe one type of sharing arrangement, but "to establish rules and policies that will insure that any such arrangement will further the public interest and remain consistent with the

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<sup>18</sup> Video Dialtone Order at para. 1.

1984 Cable Act.”<sup>19</sup> The Commission should continue to be guided by its overall goal of regulatory flexibility<sup>20</sup> to permit analog channel arrangements that efficiently utilize available technology to effectively address market needs.

The Commission, in its VDT Recon. Order and Third Further Notice, has addressed a number of rules and policies that could be applied to analog channel sharing and which would more than adequately provide the necessary regulatory framework for the offering to meet the FCC’s objectives:

- The VDT provider may not allocate all or substantially all analog capacity to a single “anchor programmer.”<sup>21</sup>
- Consistent with the common carrier nature of the basic VDT platform, the LEC’s offering of shared analog channels must be just and reasonable, with no unjust or unreasonable discrimination or preference; i.e., the shared channels will be made available to all VIPs on the VDT platform under the same rates, terms and conditions.<sup>22</sup>

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<sup>19</sup> Third Further Notice at para. 275. NYNEX agrees with the Commission’s decision not to defer consideration of VDT Section 214 Applications proposing channel sharing arrangements pending development of any needed rules and policies applying to such arrangements. On December 8, 1994, the U.S. District Court (D.Me.) issued an Opinion and Order declaring that the enforcement of the telephone company-cable television cross-ownership ban in 47 U.S.C. Section 533(b) is violative of the Constitution. NYNEX Corp. v. United States, No. 983-23-P-C. NYNEX reserves the flexibility to exercise its rights when relief from the cross-ownership ban is effected.

<sup>20</sup> Video Dialtone Order at paras. 45, 60 & n. 104.

<sup>21</sup> VDT Recon. Order at paras. 2, 35.

<sup>22</sup> See id. at para. 35; Third Further Notice at paras. 268, 271; Sections 201(b), 202(c) of Communications Act, 47 U.S.C. Sections 201(b), 202(c).



- The shared channels must accommodate multiple VIPs.<sup>23</sup>
- Subject to current non-ownership restrictions, VIPs and not the VDT provider will be responsible for the selection, charging and control of video programming provided to subscribers<sup>24</sup> and VIPs would be responsible for obtaining rights to the programming on the shared channels.<sup>25</sup>

Given the nascent, evolutionary and variable nature of VDT, NYNEX believes that the Commission's overall regulatory flexibility policy dictates that no further rules or policies governing channel sharing need be adopted at this time.

NYNEX has proposed an analog channel sharing approach which we believe comports with the Commission's overall regulatory flexibility policy.<sup>26</sup> NYNEX's approach allows for local over-the-air broadcast and PEG programming to be shared by all VIPs utilizing the VDT service. An administrator identified using fair and reasonable selection criteria would serve on a nondiscriminatory basis to facilitate the administration of the local over-the-air broadcast and public access programming.

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<sup>23</sup> Third Further Notice at para. 268; VDT Recon. Order at para. 35.

<sup>24</sup> See VDT Section 214 Application of Southern New England Tel. Co., W-P-C-6858, Order and Authorization released November 22, 1994, para. 28. A telephone company would not be deemed to transmit video programming unless it actively participates in the selection and distribution of video programming. National Cable Television Association v. FCC, 33 F. 3d 66, 72 (D.C. Cir. 1994).

<sup>25</sup> See Third Further Notice at para. 273.

<sup>26</sup> See NYNEX VDT Section 214 Applications for R.I. (W-P-C-6982) and Mass. (W-P-C-6983). In those proceedings, NYNEX has submitted an analog channel/administrator proposal that comfortably fits within the Commission's concept of channel sharing.

The Commission is aware that the majority of Section 214 applications propose a form of analog channel sharing for the small amount of foundation local over-the-air broadcast and public access programming necessary to make VDT a success.<sup>27</sup> The Commission's regulatory flexibility policy should continue to allow varying approaches.

### **III. VIDEO DIALTONE PROVIDERS SHOULD BE PERMITTED TO ADOPT PREFERENTIAL ACCESS ARRANGEMENTS WHICH ARE APPROPRIATE FOR VIDEO DIALTONE SERVICE**

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The Commission requests comment "on whether we legally can, and should, mandate preferential video dialtone treatment for commercial broadcasters or for certain classes of PEG or not-for-profit video programmers."<sup>28</sup> The Commission does not have the legal authority to impose preferential access obligations on video dialtone providers similar to obligations imposed on cable operators. Video dialtone providers should, however, be permitted to adopt appropriate preferential access arrangements. In addition, the process for recovering the cost of preferential access must also be examined.<sup>29</sup>

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<sup>27</sup> The Commission notes that most analog channel sharing plans that have been put forth provide for about 10 to 15 common channels. Third Further Notice at paras. 271-73.

<sup>28</sup> Third Further Notice at para. 281.

<sup>29</sup> The Commission recognized the potential adverse impact of preferential access on the viability of video dialtone services: "If the Commission required LECs to subsidize video dialtone service for certain video programmers, they would presumably have to raise rates for other programmer-customers. These prices, if sufficiently high, could suppress video dialtone demand, thereby unnecessarily impeding the development of video dialtone systems." VDT Recon. Order at n. 480.

NYNEX does recognize the validity of public policy goals of providing customer access to certain programming. Broad dissemination of broadcast signals is in the public interest to assure the availability of information provided by both local commercial and educational programming stations. Likewise, access to activities of local government and public institutions through channels designated for public, educational and governmental use enhance the ability of the public to participate in local government activities which directly impact each citizen. Preferential access arrangements must, however, be tailored to the economic and market considerations of video dialtone services. NYNEX proposes, therefore, to participate with the FCC to examine preferential access arrangements. That examination will determine the appropriateness of preferential access arrangements for video dialtone services including whether this is a Level 1 or Level 2 obligation and the full range of options for preferential rate treatment.

The mandatory access arrangements enacted by Congress in sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 are applicable only to cable operators and were enacted to address a specific market situation. In Turner v. FCC,<sup>30</sup> the U.S. Supreme Court examined the legislative history of these particular provisions:

In brief, Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a

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<sup>30</sup> 114 S. Ct. 2445 (1994).

viewing audience and thus for necessary operating revenues. Congress determined that regulation of the market for video programming was necessary to correct this competitive imbalance.

According to Congress, this market position gives cable operators the power and the incentive to harm broadcast competitors. The power derives from the cable operator's ability, as owner of the transmission facility, to 'terminate the retransmissions of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position.' (Citation omitted.) The incentive derives from the economic reality that '[c]able television systems and broadcast television stations increasingly compete for television advertising revenues.'<sup>31</sup>

Fledgling, nascent video dialtone providers pose no threat nor do they have the incentive to harm broadcast competitors by terminating or refusing to transmit broadcast signals. The absence of requisite market power by video dialtone providers has been confirmed by the Commission in its First Report to Congress on the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 94-48 (FCC 94-235). In its Report the Commission concluded:

A number of issues remain unresolved with respect to the participation of LECs in the delivery of video programming. The regulatory framework for permitting LECs to construct and operate a common

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<sup>31</sup> Id. at 2454.

carrier VDT platform for the transmission of video programming and other services to end-users is under review by the Commission. Moreover, legislation proposing, among other things, to eliminate the telephone company-cable company cross-ownership ban is pending before Congress. As noted above, the VDT industry is in its initial planning and construction phases. In future reports, the Commission will further review the development of LEC provision of video programming and its status as a competitive alternative to cable.<sup>32</sup>

Given the absence of market power, it is inappropriate for the Commission to impose mandatory preferential video dialtone access requirements. Rather, video dialtone providers should be permitted to adopt appropriate preferential access arrangements.

The 1984 Cable Act authorizes the local franchising authority to “require as part of a franchise ... that channel capacity be designated for public, educational, or governmental use....”<sup>33</sup> Cable operators may use channels designated for public, educational or governmental use to add a qualified low power station (47 U.S.C. § 534 (c)(2)) and qualified local noncommercial educational television stations to a cable system (47 U.S.C. § 535 (d)).

The Commission has previously determined that the provision of video dialtone service pursuant to Title II regulation as a common carrier service does not require the provider to obtain a local franchise.<sup>34</sup> That determination

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<sup>32</sup> Id. at 60-61.

<sup>33</sup> 47 U.S.C. at § 531(b).

<sup>34</sup> First Report and Order, 7 FCC Rcd 300, 324-8, paras. 50-52 (1991).

has been upheld on judicial review.<sup>35</sup> Since Congress has authorized only the local franchising authority to impose a requirement to devote a portion of the available channel capacity for public, educational and governmental use, it is impermissible for the Commission to exercise comparable authority to impose such a requirement on VDT providers. VDT providers should, however, be permitted to voluntarily adopt preferential access arrangements to accommodate PEG programming.

#### **IV. VIDEO DIALTONE PROVIDERS SHOULD NOT BE REQUIRED TO MAKE A STATEMENT OF AVAILABILITY OF POLE ATTACHMENT AND CONDUIT RIGHTS**

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47 U.S.C. § 224 defines the process for regulation of pole attachments.<sup>36</sup> That statute empowers the Commission to regulate the rates, terms and conditions for pole attachments and to hear and resolve complaints.<sup>37</sup> States are permitted to retain regulation of the rates, terms and conditions of pole attachments upon certification to the Commission.<sup>38</sup>

NYNEX contends that the existing regulatory structure for pole attachments provides ample opportunity for facilities-based competitors to resolve the availability of pole attachment rights. It will serve no purpose to burden the Section 214 Application process to require the inclusion of a

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<sup>35</sup> National Cable Television Association v. FCC, 33 F.3d 66 (D.C. Cir. 1994).

<sup>36</sup> “The term ‘pole attachment’ means any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility.” 47 U.S.C. § 224(a)(4).

<sup>37</sup> 47 U.S.C. § 224 (b)(1).

<sup>38</sup> 47 U.S.C. § 224 (c).

statement of availability of pole attachment rights or conduit space. The addition of this requirement would simply provide opponents of video dialtone services with yet another opportunity to impede and delay the consideration and approval of the Section 214 Application. It is particularly inappropriate to permit a Section 214 Application to be subverted into a collateral attack on pole attachments when a separate process for regulating rates, terms and conditions exists.

**V. TELEPHONE COMPANIES SHOULD BE PERMITTED TO ACQUIRE CABLE FACILITIES WHEN ECONOMIC AND MARKET FACTORS INDICATE SUCH ACQUISITION IS REASONABLE AND PRUDENT**

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The Commission has requested that parties comment on the need to retain the existing prohibition on the acquisition by telephone companies of cable facilities in their service area for provision of video dialtone.<sup>39</sup> Parties were directed to identify criteria applicable to markets in which “two wire-based multi-channel video delivery systems would likely not be viable.”<sup>40</sup> The Commission also requested comments on joint construction of video dialtone systems to encourage deployment of facilities in such markets.<sup>41</sup>

The Commission should first declare that telephone companies are permitted, but not required to acquire cable facilities in such markets. The decision of the telephone company must be based on its own evaluation of economic and market factors in each situation.

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<sup>39</sup> VDT Recon. Order at para. 276.

<sup>40</sup> Id. at para. 277.

<sup>41</sup> Id. at para. 279.

In many cases, the existing cable facilities may require extensive replacement, upgrade and/or construction before those facilities could be used by the telephone company for the provision of telephony and video services. That cost may exceed the cost which the telephone company would incur for new construction of telephony/video facilities for that market. It is not economically prudent for the telephone company to acquire existing cable facilities if the cost of acquisition and related upgrades exceeds the cost of new construction of telephony/video network facilities.

If a specific situation exists which, after examination of relevant economic and market factors, demonstrates that existing cable facilities can be acquired and upgraded to provide telephony and video services for less cost than new construction, the telephone company should be permitted to acquire those cable facilities.

Similarly, joint construction of video dialtone systems to serve particular markets should be permitted, but not required, if the telephone company and the cable operator determine that anticipated revenues from separately-constructed systems will not economically support the underlying video dialtone network infrastructure.



**VI. CONCLUSION**

For the reasons stated, the Commission should permit channel sharing arrangements for video dialtone; should explore preferential access arrangements which are appropriate for video dialtone service; should not require statements of availability of pole attachment and conduit rights; and should permit, but not require telephone companies to acquire cable facilities when reasonable and prudent.

Respectfully submitted,

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